



**Michigan Supreme Court**  
**State Court Administrative Office**  
Michigan Hall of Justice  
P.O. Box 30048  
Lansing, MI 48909  
Phone: (517) 373-0130  
John D. Ferry, Jr., State Court Administrator

**M E M O R A N D U M**

**DATE:** November 14, 2003

**TO:** Friends of the Court  
**cc:** Chief Circuit Judges and Presiding Family Division Judges  
Circuit Court Administrators  
Family Division Administrators  
Prosecuting Attorneys  
Attorney General  
Office of Child Support

**FROM:** John D. Ferry, Jr., State Court Administrator

**RE:** SCAO Administrative Memorandum 2003-11  
Friend of the Court Criminal Referral Procedure

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The Friend of the Court Act requires the State Court Administrative Office, Friend of the Court Bureau, to develop and recommend guidelines for conduct, operations, and procedures of the friend of the court offices [MCL 552.519(3)(a)]. It further states that "each friend of the court shall take all necessary steps to adopt office procedures to implement . . . the recommendations of the bureau" [MCL 552.503(6)].

State law makes failure to pay child support or abandonment of a spouse or child a felony.

The attached policy was developed in consultation with the Office of Child Support, the Prosecuting Attorneys Association of Michigan, and the Attorney General's office. It is established to guide friends of the court (FOCs) in the referral of child support payers for criminal prosecution. Please address all questions or comments to Steven Capps at (517) 373-4835 or by e-mail at [cappss@courts.mi.gov](mailto:cappss@courts.mi.gov).

## **Friend of the Court Criminal Referral Procedure**

This policy provides general information for procedures to refer cases to the prosecutor or Attorney General (individually and collectively referred to as “prosecutor” unless otherwise indicated) for criminal prosecution. The Attorney General and the local prosecutor, in consultation with the friend of the court (FOC), will develop a procedure for case referrals to the Attorney General from each county. The procedure will indicate whether the FOC office should work through the local prosecutor or directly with the Attorney General in performing its role. The FOC may request a written confirmation of the procedure when it is in place.

### **A. Classifications of Criminal Prosecution.**

There are two felony crimes related to the failure to pay child support. The first involves abandoning a spouse or child by refusing to support them.<sup>1</sup> The second involves the willful failure to pay support as it is due under a child support order.<sup>2</sup> A third statute

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<sup>1</sup>MCL 750.161 reads: Sec. 161. (1) A person who deserts and abandons his or her spouse or deserts and abandons his or her children under 17 years of age, without providing necessary and proper shelter, food, care, and clothing for them, and a person who being of sufficient ability fails, neglects, or refuses to provide necessary and proper shelter, food, care, and clothing for his or her spouse or his or her children under 17 years of age, is guilty of a felony, punishable by imprisonment in a state correctional facility for not less than 1 year and not more than 3 years, or by imprisonment in the county jail for not less than 3 months and not more than 1 year. (2) If at any time before sentence the defendant enters into bond to the people of the state of Michigan in such penal sum for such term and with such surety or sureties as may be fixed by the court, conditioned that he or she will furnish his or her spouse and children with necessary and proper shelter, food, care, and clothing, or will pay to the clerk of the court, or other designated person, such sums of money at such times as the court shall order to be used to provide food, shelter, and clothing for his or her spouse and children, or either of them, then the court may make an order placing the defendant in charge of a probation officer. The court may require that the defendant shall from time to time report to the probation officer as provided by law. The court may extend the period of probation from time to time or the court may defer sentence in the cause, but no term of any bond or any probation period shall exceed the maximum term of imprisonment as provided for in this section. (3) Upon failure of the defendant to comply with any of the conditions contained in the bond, the defendant may be ordered to appear before the court and show cause why sentence should not be imposed, whereupon the court may pass sentence, or for good cause shown may modify the order and further defer sentence as may be just and proper. Whenever the whereabouts of the defendant is unknown, the court may summarily issue a bench warrant for the arrest of the defendant. (4) The court, upon default by the defendant to comply with the conditions of the bond and the orders of the court, shall notify the prosecuting attorney, who shall immediately file a petition in the court in which the cause is pending to declare the bond forfeited. A copy of the petition and a notice of hearing on the petition shall be served upon the surety or sureties, if any, named in the bond at least 4 days before the hearing of the petition. Upon holding a hearing on the petition, the court may declare the bond forfeited. When so ordered, the prosecuting attorney shall immediately institute the necessary action to collect the principal sum of the bond. If a cash bond has been filed, the cash bond shall be declared forfeited by the court. (5) All sums received from bonds being forfeited shall be paid to the clerk of the court, who shall hold and disburse the money for the use of those entitled to the money in accordance with the orders of the court for their necessary food, care, shelter, and clothing. (6) Desertion, abandonment, or refusal or neglect to provide necessary and proper shelter, food, care, and clothing as provided in this section shall be considered to be a continuing offense and may be so set out in any complaint or information. Proof of the offense charged at any time during the period alleged in the complaint or information shall be considered proof of a violation of this section.

<sup>2</sup>MCL 750.165 reads: Sec. 165. (1) If the court orders an individual to pay support for the individual's former or current spouse, or for a child of the individual, and the individual does not pay the support in the amount or at the time stated in the order, the individual is guilty of a felony punishable by imprisonment for not more than 4 years or

makes it a misdemeanor for a person of sufficient ability to refuse or neglect to support his or her family.<sup>3</sup>

## B. Criminal Prosecution and Separation of Powers.

The FOC is part of the judicial branch. The prosecutors are part of the executive branch. Because the judicial branch decides cases the prosecutors file, neither the court nor the FOC should refer a case based on a subjective determination that the individual payer is or is not behaving criminally. The process for an FOC to select cases for referral must, therefore, be based on specific objective criteria. FOCs may not select cases for referral that do not meet the criteria, nor may they refrain from referring cases that meet the criteria.

The prosecutor may also receive contact directly from custodial parents who desire review of their cases for criminal prosecution. The prosecutor may request information from the FOC to assist in a complete review of the cases. Direct referral cases are not governed by the criteria for referral as the review did not initiate with the FOC.

## C. Criteria for Referral.

The Prosecutor has sole discretion for determining which cases to prosecute. FOCs may refer cases to the prosecutor that satisfy objective criteria. MiCSES will generate a list<sup>4</sup> to identify cases that meet specific criteria for referral based on the following factors:

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by a fine of not more than \$2,000.00, or both. (2) This section does not apply unless the individual ordered to pay support appeared in, or received notice by personal service of, the action in which the support order was issued. (3) The court may suspend the sentence of an individual convicted under this section if the individual files with the court a bond in the amount and with the sureties the court requires. At a minimum, the bond must be conditioned on the individual's compliance with the support order. If the court suspends a sentence under this subsection and the individual does not comply with the support order or another condition on the bond, the court may order the individual to appear and show cause why the court should not impose the sentence and enforce the bond. After the hearing, the court may enforce the bond or impose the sentence, or both, or may permit the filing of a new bond and again suspend the sentence. The court shall order a support amount enforced under this section to be paid to the clerk or friend of the court or to the state disbursement unit. (4) As used in this section, "state disbursement unit" or "SDU" means the entity established in section 6 of the office of child support act, 1971 PA 174, MCL 400.236.

<sup>3</sup>MCL 750.167 reads, in part: "Sec. 167. (1) A person is a disorderly person if the person is any of the following: (a) A person of sufficient ability who refuses or neglects to support his or her family. .... (2) When a person, who has been convicted of refusing or neglecting to support his or her family under this section, is then charged with subsequent violations within a period of 2 years, that person shall be prosecuted as a second offender, or third and subsequent offender, as provided in section 168, if the family of that person is then receiving public relief or support." MCL 750.168 reads: "Sec. 168. Any person convicted of being a disorderly person shall be guilty of a misdemeanor."

<sup>4</sup>OCS has submitted a request for programming the query to generate this list. OCS will provide further information concerning the query as it becomes available.

1. Amount Owed.

The prosecuting attorneys in each county will set the threshold amount of arrears for referrals to their respective offices. The Attorney General will accept cases only where the payer owes support arrears in excess of \$40,000.00 unless the Attorney General and local prosecutor have agreed otherwise. These cases will be isolated by a query to MiCSES or Data Warehouse. The prosecuting attorney and the Attorney General will develop an agreement in each county on which cases will be handled by each office, and how cases will be referred between each office and the FOC.

2. Residency.

Felony prosecution may be authorized without regard to whether a payer is a resident of Michigan, however, it shall be within the discretion of each prosecutor to determine whether extradition will be sought for payers who are non-residents. Further, it shall be within the discretion of each prosecutor to determine whether to proceed in cases where the payee is a non-resident of the state or of the county in which the prosecutor is located. For payers living outside the state of Michigan, federal criminal prosecution may also be an option.<sup>5</sup>

3. Lack of Current Payments.

The payer made payments that total less than 51 percent of the amount that became due during the past six months. The payment percentage may change at the option of the prosecutor.

4. Knowledge of Obligation.

The payer must know of the obligation. The FOC should provide a copy of a completed checklist to the prosecutor to assist the prosecutor in establishing that the payer has knowledge. The checklist is attached as Appendix A. The FOC will only review cases for this factor upon receiving a list of cases meeting the criteria in items 1-3.

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<sup>5</sup>The Family Independence Agency's AT #2001-044 details the Michigan Non-Support Special Project, aka Project Save Our Children that has been in existence since April 1998. The Office of Child Support, the FOC offices, and Prosecuting Attorney offices participate jointly with this project for state and federal felony cases. Please note that a referral criteria for a federal felony case in this program is an arrears threshold of \$20,000 or more in support arrears.

In 2000, the taskforce halted federal prosecutions due to a Federal District Court ruling in Timothy Gordon Faasse's case. However, on September 14, 2001, a ruling from the United States Court of Appeals *United States v Timothy Gordon Faasse*, 277 F3d 660 (CA 6, 2001) allowed the taskforce to once again work on federal felony cases.

5. Ability to Pay.

The payer must have the ability to make support payments. The Data Warehouse will be matched with those individuals who remain after factors 1-4 have been applied to determine whether specific information is present in the Data Warehouse indicating an ability to pay. The FOC will also prepare a checklist to forward to the prosecutor to assist the prosecutor in establishing whether the payer has an ability to pay. The checklist is attached as Appendix B.

6. Custodial Parent Questionnaire.

After the criteria in 1-5 are satisfied, the prosecutor will send a questionnaire to the custodial parent. The questionnaire has been designed to provide the prosecutor with basic information that will aid in the decision whether to file charges. The questionnaire is attached as Appendix C. Each local FOC office may decide whether it wants to have the questionnaire returned to the FOC or returned directly to the prosecutor. If the questionnaire is returned to the FOC, it will review the questionnaire to determine whether additional enforcement information is available in the questionnaire and then forward the questionnaire to the prosecutor.

D. Requests for Warrants to the Prosecutor from the FOC.

When certified police officers are employed within the FOC office, but are acting within that office in their capacity as police officers whose activities are not directed by the FOC, they may make requests for felony non-support prosecutions directly to the prosecutor. In these situations, the officer should use a police report format and the warrant request forms approved by the prosecutor.

E. Cases Requiring Special Handling.

Certain cases require special handling to protect the payee or a child. Cases involving domestic violence, as indicated by a family violence indicator, or by information received from the payee, should be referred with a special notice to the prosecutor concerning the domestic violence. The same is true of a case involving a good cause exemption from enforcement. The prosecutor can then take the necessary action to see that the victim of domestic violence is protected during the prosecution.

The obligee may also have informed the FOC of a desire to protect the child from seeing the other parent prosecuted and portrayed in the media as a criminal. The prosecutor should be made aware of these concerns at the time the referral occurs.

F. Cases that Result in Prosecution.

When a case results in prosecution, the prosecutor has agreed to inform the FOC immediately. To prevent a payer from coercing a payee into abating an arrearage in

order to thwart the criminal prosecution, the FOC should clearly flag files that are being prosecuted to alert staff and the court handling the civil case that a prosecution is pending and that the prosecutor should be notified of any action to reduce or abate the arrearage.

G. Referred Cases that do not Result in Prosecution.

When a case is referred and it does not result in prosecution, the prosecutor has agreed to inform the FOC immediately and forward any additional information obtained as a result of the prosecutor's investigation. The case should be referred to the Non-Custodial Parent Program (NCP) if the payer resides in Michigan and is not paying, is unemployed, or is underemployed.

H. Confidentiality of Records.

Title IV-D makes IV-D records confidential and prohibits their release for non-IV-D purposes. MCR 3.218 makes records confidential except to the parties and other listed individuals except for use for IV-D purposes. A prosecutor or the Attorney General may, by contract, become a IV-D service provider. When such a contract exists, FOC offices may share information in the FOC files with the prosecutor or Attorney General.<sup>6</sup> If there is not a contract for the prosecutor or Attorney General to provide services under Title IV-D, the information in the file may only be disclosed by court order. If there is a IV-D contract, non IV-D information that remains confidential under MCR 3.218 can be disclosed only on the basis of a court order.

I. FOC Communication with a Payer who may be Referred for Prosecution.

The FOC must communicate with a payer who has been referred for criminal prosecution concerning the civil aspects of the case. Because certain communications concerning another's criminal activity could subject the person making the communication to criminal liability, the FOC should refrain from discussing the criminal proceedings and should not threaten criminal prosecution to obtain child support payments in the case.<sup>6</sup> The FOC does not have the authority to attempt to negotiate a settlement in a pending criminal action.

J. Post Conviction Action.

The court may require a payer to post a bond or serve probation as a result of the criminal case. Depending on the sentence, the payer may have an obligation to post bond with the

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<sup>5</sup>An SCAO Memorandum dated July 28, 2003, confirmed that a IV-D contract is in place with the Attorney General.

<sup>6</sup>MCL 750.213 reads: Sec. 213. Any person who shall, either orally or by a written or printed communication, maliciously threaten to accuse another of any crime or offense, or shall orally or by any written or printed communication maliciously threaten any injury to the person or property or mother, father, husband, wife or child of another with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do or refrain from doing any act against his will, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 20 years or by a fine of not more than \$10,000 dollars.

FOC or report periodically to the FOC. Upon a default in a term of probation, the FOC would be required to report the default to the probation department.

K. Statistical Information.

The prosecutor, Office of Child Support, and the FOCs will collect information concerning criminal referrals and collections to evaluate the success of the program.

L. Communication.

Information concerning criminal prosecution will be placed on the Michigan's One Court of Justice website, in the automated e-mail response, and in a model press release.

The information will advise the public that the FOC does not prosecute cases and of the role of the prosecutor in doing so.

## **Appendix A**

### **Knowledge of Obligation Checklist**



### **Knowledge of Obligation Checklist**

Payer Name: \_\_\_\_\_

Case No. \_\_\_\_\_

Check all of the following that apply:

- ☐ There is a proof of service for the complaint in the file.
- ☐ There is a proof of service of the order in the file.
- ☐ The payer paid support in the case.
- ☐ The payer appeared at hearings or filed pleadings in the case.
- ☐ The payer acknowledged owing the support (state facts).
- ☐ The payer corresponded concerning the case.

## **Appendix B**

### **Ability to Pay Checklist**

## Ability to Pay Checklist

Check all of the following that apply:

- ☐ The payer has been employed in the past.
- ☐ The payer has acknowledged working "under the table."
- ☐ The payee has reported that the payer is working "under the table."
- ☐ The payer has assets that indicate an ability to pay (provide specifics).
  - ☐ real or personal property, assets, or legal interests of the payer with a sufficient net value;
  - ☐ real or personal property or assets purchased during periods of nonpayment;
  - ☐ evidence of lifestyle;
  - ☐ available sources of credit which could be used to make full or partial payment on the arrearage, bank accounts, stocks, bonds, and other holdings;
  - ☐ work history, including periods of known income when no or minimal payments were made;
  - ☐ education, specialized skills, or training which the payer could utilize to generate an income; and
  - ☐ subpoenaed loan or credit applications.
- ☐ Other (describe).

## **Appendix C**

### **Felony Non-Support Custodial Parent Questionnaire**

# FELONY NON-SUPPORT – CUSTODIAL PARENT QUESTIONNAIRE

## I. Custodial Parent (CP)/Parent with Child(ren)

Name \_\_\_\_\_ Today's Date \_\_\_\_/\_\_\_\_/\_\_\_\_

Address \_\_\_\_\_ Home Phone \_\_\_\_\_

\_\_\_\_\_ Work Phone \_\_\_\_\_

Social Security No. \_\_\_\_\_ Date of Birth \_\_\_\_\_

**Child Support:** Amount of Weekly Support \_\_\_\_\_ Case Worker's Name \_\_\_\_\_

Case Name \_\_\_\_\_ Case No. \_\_\_\_\_ County \_\_\_\_\_

Arrearage Owed \_\_\_\_\_ State Portion \_\_\_\_\_

Birth Expenses Paid by Medicaid: Yes ☐ No ☐

Date of Order for Support \_\_\_\_\_ Copy of Order: Yes ☐ No ☐

Amount Last Paid and Date \_\_\_\_\_ Case Worker's Phone \_\_\_\_\_

Names of Child(ren) \_\_\_\_\_ Date of Birth \_\_\_\_\_

\_\_\_\_\_ Date of Birth \_\_\_\_\_

\_\_\_\_\_ Date of Birth \_\_\_\_\_

Relationship with NCP: ☐ Married ☐ Divorced ☐ Never Married ☐ Short Term ☐ Long Term

## II. Non-Custodial Parent (NCP)/Person Paying Child Support

Name \_\_\_\_\_ Social Security No. \_\_\_\_\_

Address \_\_\_\_\_ Home Phone \_\_\_\_\_

\_\_\_\_\_ Work Phone \_\_\_\_\_

Date of Birth \_\_\_\_\_ Driver's License No. \_\_\_\_\_

Description of  
Vehicle \_\_\_\_\_

Prior Domestic Violence History: Yes ☐ No ☐

**Physical Description:** Height \_\_\_\_\_ Weight \_\_\_\_\_ Eyes \_\_\_\_\_  
Hair \_\_\_\_\_ Race \_\_\_\_\_ Other \_\_\_\_\_

\*Please attach a photograph of the NCP if one is available (it will not be returned).

**NCP's Immediate Family:** Name \_\_\_\_\_ Relation to NCP \_\_\_\_\_

Address \_\_\_\_\_ Home Phone \_\_\_\_\_

\_\_\_\_\_ Work Phone \_\_\_\_\_

\* \* \* \* \*

Name \_\_\_\_\_ Relation to NCP \_\_\_\_\_

Address \_\_\_\_\_ Home Phone \_\_\_\_\_

\_\_\_\_\_ Work Phone \_\_\_\_\_

**Work History:** Present \_\_\_\_\_ Location \_\_\_\_\_

Dates Employed \_\_\_\_\_ Approximate Income \_\_\_\_\_

\* \* \* \* \*

Past Company \_\_\_\_\_ Location \_\_\_\_\_

Dates Employed \_\_\_\_\_ Approximate Income \_\_\_\_\_

### III. Additional Information:

1. Is the NCP the biological parent of each child?
2. Where did the NCP live when the court order was entered for child support.
3. What evidence is there the NCP had actual knowledge of the court order to pay? (e.g. personal service, voluntary payments, appearances in court)
4. What is the NCP's education background and specialized job skills?

5. State everything you know, and the source(s) of this information, about:
  - ability to work –
  - income –
  - assets –
6. Have the children lived with you continuously since the child support order was issued? If not, explain.
7. What contact does the NCP have with the Children? What contact has occurred in the past?
8. Have you received direct payment for the NCP or his/her family, which did not go through the Friend of the Court?
9. Have you ever agreed to a support arrangement that is different from the court order? If so, explain.
10. Did you offer or agree not to request child support for any reason? If so, explain.
11. Has the NCP ever been arrested for a crime? If so, explain.
12. Are there any outstanding warrants for the NCP?
13. What reasons might the NCP give for non-payment of child support?

14. Has the NCP ever declared bankruptcy? If so, explain.
15. Do you have a copy of any tax returns filed during your marriage that you could enclose?  
If not, please state your income for the years you were married or lived together.
16. Please describe the enforcement proceedings that have taken place and the agency that took action, including the number of bench warrants issued.
17. Has the NCP been investigated or prosecuted for criminal non-support?
18. To your knowledge, has the NCP ever been disabled, or received social security benefits for a disability?
19. State any other information you might think would be helpful for us to know.
20. Have the children ever been adopted, and if so, when?
21. Once a criminal charge has been brought, you cannot have it dropped or reduced. Any charge reduction is in the discretion of the Prosecutor/Attorney General's Office. As a result of prosecution, the NCP may go to jail or prison and would not be paying child support while incarcerated. The proceedings may put a strain on any relationship he/she has with the children, and/or possibly between the children and you. There is no assurance that you will receive any money due to criminal prosecution and you will be required to testify in court. With these things in mind, do you want to request criminal prosecution? If so, please sign below.

Please sign here \_\_\_\_\_

Date \_\_\_\_/\_\_\_\_/\_\_\_\_